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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY RANDOLPH WRIGHT, Defendant and Appellant.	G040053 (Super. Ct. No. SWF014044) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Judith C. Clark, Judge. Affirmed as modified.

Mary Woodward Wells, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant contends his discussions with an associate pastor are privileged. He also argues the court erred in permitting evidence of prior bad acts. With the exception of ordering correction of the abstract of judgment, we affirm.

I

FACTS

We present the facts in the light most favorable to the judgment in accord with established rules of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142-143.)

A jury returned guilty verdicts on counts one through nine, lewd act with children under 14 years old, and on counts 10 through 19, possession of child pornography with intent to distribute. The court sentenced defendant Jeffrey Randolph Wright to a determinate sentence of eight years to be followed by an indeterminate sentence of 135 years to life.

The Associate Pastor

Defendant moved to exclude the testimony of associate pastor. He claimed a conversation defendant and the associate pastor had on October 25, 2005, is protected by the penitent privilege. The court denied his motion, stating: "I just think this is a situation where it doesn't fall as a penitential because this isn't a communication made in confidence. It's clearly represented to Mr. Wright to begin with it's not going to be held in confidence. Pastor . . . is going to report this. And the fact that Mr. Wright still chose to speak is at his own peril."

The associate pastor of a church in Riverside County testified that he oversees the children's ministry. Defendant was a volunteer who helped with the youth group and taught a class.

In October 2005, the pastor received a telephone call from parishioners named the F.'s about their son. The associate pastor and pastor went to the F.'s home

and, according to the associate pastor, "we called the police." A police officer with the Hemet Police Department came to the F.'s home and an investigation was started.

On October 25, 2005, defendant telephoned the associate pastor to say he had been summoned to the police station. That evening, the associate pastor and defendant had a conversation because defendant "said he wanted to talk something over with" the associate pastor. Defendant wanted to speak privately, and they went to a secluded area of a restaurant.

The associate pastor said, "At the beginning of our conversation when we had sat down at the table before Jeff shared anything with me, I told him that — that anything that he shared with me I would have to tell the police, yes." Defendant shook his head and said, "I understand." Defendant asked the associate pastor to speak with his wife about the investigation. Defendant said it would be difficult for her to understand what was going on, and maybe the associate pastor "could explain things a little bit and talk to her."

Defendant told the associate pastor that a youth named Tyler F. sat next to him under a blanket and fondled defendant's penis and defendant had an orgasm. According to the associate pastor, defendant said he had ejaculated on the blanket, explaining to the associate pastor "that while they were at our house on that Sunday on the couch, that Tyler had — Tyler had — pulled Jeff's penis out of his pants and had manipulated it, and that Jeff had had an orgasm within a few seconds. And he was unsure what to do, if he should have stood up and said 'Don't do that,' or what." The associate pastor said he felt defendant "was almost trying to get me on his side, like maybe I could put in a good word for the police."

The associate pastor further testified both junior and senior high school students meet at either a café or the associate pastor's home on Wednesday evenings. The meetings include students from the seventh grade through seniors in high school. Sometimes younger children attend, too. The associate pastor estimated the weekly

meeting has youths from 12 to 20 years old in attendance. Adult presence usually consisted of the associate pastor, his wife and defendant.

Outside of the youth group, the associate pastor and defendant had a lot of contact. According to the associate pastor: "Jeff and I were very close. We played softball together on a church team. Often we were at Monday night football together. Our church had a fantasy football league started in 2005, and Jeff and I were both involved in that. So we had quite a bit of contacts. Played softball, usually at least once a week together. We also had a church team sometimes in the summer, and Jeff and I were both involved in that. So we were very close."

The associate pastor saw defendant and Tyler together many times, "50 maybe." He saw them alone together two or three times. A couple of times the associate pastor saw defendant alone in the back seat of a car.

On a Sunday in October 2005, the associate pastor described what he saw: "Jeff and Tyler were sitting together on the couch under a blanket. There were other kids there as well. I remember that it was often kids would kind of drift around, 'cause we have a covered patio. It was an addition to the house. And we call that the teen room, where we don't mind it quite so much if they trash it up. And we put all the video games and stuff out there, and couches. And then we also have our living room with the couch, and the big TV. So kids would kind of drift in and out. They would come watch football on the big screen in the living room, and then go out to the teen room, play video games. So kids were wandering. But I specifically remember at one point that Jeff and Tyler and a Dylan and Jacob, Jeff's son, were there on the couch." Later the associate pastor turned the blanket over to the police.

Tyler F.

Fourteen-year-old Tyler first met defendant when he was in the fifth grade. He was friends with defendant's son. On one occasion when he was 12 years old, a

group of 20 or 25 from the church went to an event at a stadium in San Diego. They spent the night in sleeping bags in a cleared out room in a church. Defendant set up his sleeping bag next to Tyler. When Tyler went to sleep, his sleeping bag was zipped closed, but Tyler said, "somehow the sleeping bag made it over to where mine was. And he unzipped mine. And it was more touching, that was the first time." Tyler heard the unzipping of his bag and then felt a hand on his penis. According to Tyler, he "felt uncomfortable. 'Cause, I mean I was friends with his son. And it was just kind of weird, that it was happening." He said defendant then "started giving me oral sex." Tyler told defendant to stop and he did.

Sometime after the San Diego outing, Tyler and defendant were in the back seat of defendant's car in the parking lot of a café, and defendant's son was in the front seat. The three of them were talking. Defendant opened the button and zipper of Tyler's shorts and touched his penis. He continued, "A few minutes until the pastor had walked out to gather the kids for the sermon."

There was another incident in a car where Tyler testified defendant "wanted me to give him oral sex." Tyler thinks defendant asked for it, "but then of a sudden, the pastor had walked out."

In "either the end of 2005 or maybe 2006," a couple of months after the two incidents in the car, Tyler was at defendant's house playing with defendant's son Jacob. Tyler was using the computer and "[s]omehow pornography ended up on the computer." Tyler was looking at the pornography and defendant masturbated. Defendant asked Tyler to "masturbate with him" and Tyler refused.

A couple of weeks later, Tyler was again playing with Jacob in defendant's backyard. The boys ran out of paintballs and Tyler went to the garage to get more. Tyler testified that in the garage defendant "took my penis out of my boxer hole" and touched him.

Tyler said that "probably a year and a half" earlier, "Pastor . . . " had the kids over to his house on a Sunday. Defendant sat next to Tyler on a couch when defendant and a group watched a football game. Tyler used a blanket because it was cold. He said, "It was covering me at first and then I guess [defendant] got cold and pulled it over him." Defendant asked Tyler to have oral sex, and Tyler testified: "I give it to him for like a minute or so or something. And then like somebody walked by, and at that point again where he had to stop because people were walking in and out watching football." Semen "ended up on [Tyler's] shirt."

Trey T.

Trey T. was 15 years old and in the ninth grade when he testified at the August 2007 trial. He was friends with defendant's son Jacob from the third through the seventh grades. When Trey was asked what happened between him and defendant, he said he was at defendant's house playing with Jacob, and that "[t]he first time he asked me to pull down my pants so he could take a picture of my dick. And then he took that picture and uploaded that to his computer." Tyler added, "I remember he created an email account for me. And he may have sent the picture to me . . . ."

On another occasion when Trey was at defendant's house, Trey said defendant "wanted me to get my dick hard, so that way he could measure it. So he could see how long it was." Trey said that another time defendant "had me laid down on the ground and then he put peanut butter on my penis and then had the dog come and lick it off." At a different time when Trey was at defendant's house, defendant sat next to Trey on the couch. Defendant placed and pillow over his hand and part of Trey and stroked Trey's penis. Another time, when Trey was in defendant's car, defendant masturbated. Defendant also masturbated at his house in front of Trey.

Nathaniel G.

Nathaniel G. was 17 years old and a senior in high school when he testified. He was in the same room as defendant at defendant's house changing into swim trunks to go for a swim. Nathaniel took his pants off, and defendant asked him how big his penis was. Nathaniel "got it hard" and showed him. Nathaniel said defendant then "asked me to jack off." Nathaniel tried but nothing happened and defendant "came over and started to rub it." Nathaniel ejaculated into a towel defendant was holding.

Joseph L.

Joseph L. was 26 years old when he testified. He last lived in California in 1995 when he was 14 years old. Before his family moved out of California, defendant lived four houses away. Joseph said defendant "was just one of the parents who lived in the neighborhood and had a few kids. And whenever we were out playing, he would always come out and give us pointers on baseball or football wherever we were on the street."

When Joseph was in the seventh to the ninth grades, defendant touched him inappropriately. Several times when Joseph was at defendant's house in Poway, defendant exposed his penis to Joseph. More than once, defendant had Joseph touch defendant's penis, and defendant touched Joseph's penis.

Matthew P.

Matthew P. was 20 years old when he testified. He has lived in Poway all of his life. Defendant used to live across the street from Matthew. Until the day of his testimony, Matthew had not seen defendant since he was six years old. Matthew played with defendant's daughters and went to defendant's house three or four times a week. Matthew said defendant was "a cool guy" and that he could trust him.

Matthew described what happened at defendant's house: "We were usually in his house and his daughters and I would be playing together. And he would tell his daughters it's time for girls' time. And it's time for boys' time. We'd each go in separate rooms. I would be with Jeff. We would be watching TV. And he would explain to me that if I was good during the TV show, during the commercials, he would give me a treat. And during the commercials he would touch me." When Matthew was asked where defendant would touch him, he said, "My penis." When Matthew was asked how many times that happened, he said, "More than I can count." He said his treat would be popsicles and popcorn.

The court told the jury: "It is hereby stipulated between the parties that in 1994, the defendant, Jeffrey Randolph Wright, was acquitted in the San Diego Superior Court in a criminal case charging allegations of sexual misconduct against witnesses Joseph and Matthew. Their testimony in this court included the same factual allegations that were the subject of the 1994 trial."

II

DISCUSSION

Defendant contends the court erred in admitting the associate pastor's testimony about his conversation with him on October 25, 2005. He claims it was subject to the clergy-penitent privilege.

"[A] 'member of the clergy' means a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization." (Evid. Code § 1030.)[1] A '"penitent' means a person who has made a penitential communication to a member of the clergy." (§ 1031.) A "'penitential communication' means a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the

[1] All statutory references are to the Evidence Code.

discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret." (§ 1032.) "[A] penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege." (§ 1033.)

If the penitent privilege is claimed, "the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential." (§ 917, subd. (a).)

The penitent privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure . . . ." (§ 912, subd. (a).)

In *People v. Edwards* (1988) 203 Cal.App.3d 1358, the defendant claimed her conversation with a priest about embezzlement of church funds was a penitential communication. But the priest said he thought the defendant's statements "were in the nature of a secular request seeking counseling and not absolution; that when he offered to assist in her predicament requiring that the substance of their confidential discussion be divulged, defendant willingly agreed." (*Id.* at p. 1363.)

The *Edwards* court determined: "Since the trial court fully considered and evaluated all of the conflicting evidence in reaching its factual determination that the questioned statement was not a penitential communication within legal contemplation, no privilege attached preventing Father Rankin from otherwise consensually disclosing the content of the nonpenitential, though private, communication to the church officials and, ultimately, to the authorities. Where such determination is supported by substantial,

credible evidence, as shown, we are duty bound to uphold it. [Citations.]" (*People v. Edwards, supra,* 203 Cal.App.3d at p. 1365.)

Here, the trial court's finding the October 25 conversation was not a penitential communication is also supported by substantial, credible evidence. The associate pastor told defendant at the beginning of the conversation that he would have to tell the authorities the content of their conversation. Additionally, defendant specifically asked the associate pastor to discuss the investigation with his wife. The trial judge got it right.

Nonetheless, even were the conversation subject to the penitential privilege, any error is harmless. There was no manifest miscarriage of justice here. The Attorney General correctly points out that the associate pastor's testimony permitted "introduction into evidence of [defendant's] story that he was helpless to stop Tyler's sudden manipulation of his penis to orgasm allowed [defendant] to get his version of events in front of the jury without subjecting himself to cross-examination." Furthermore, the associate pastor's testimony about his discussions with defendant was testified to by Tyler as well as the associate pastor's observations of the two under the blanket.

Prior bad acts evidence

Defendant next argues the trial court erred in admitting evidence he committed prior uncharged sexual offenses "because the evidence lacked sufficient probative value and had no effect other than to inflame and confuse the jury." The Attorney General counters the evidence was properly admitted because its probative value outweighed any danger of undue prejudice, and because the prior acts showed defendant's intent.

Section 1101 precludes the admission of evidence of uncharged crimes when offered to show nothing more than bad character or a propensity for criminality. But that section further provides, "Nothing in this section prohibits the admission of

evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (§ 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) "Admission of Evidence Code section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court. The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' The trial court's determination will not be disturbed on appeal absent a clear showing of an abuse of discretion. [Citations.]" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1610.)

"On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a).)

Here the testimony of Joseph and Matthew consumed a relatively small amount of time. Both men testified about acts remarkably similar to the present crimes, which balanced out any prejudice due to remoteness. (*People v. Walker* (2006) 139 Cal.App.4th 782, 807.) The prior acts were no more inflammatory than the evidence in the current charges. In both the prior acts and present crimes, defendant placed himself in a position of trust with young boys and breached that trust by performing the acts

described in the evidence. The probative value of Joseph and Matthew's testimony was substantial. The trial court did not err in allowing admission of the prior acts.

III

DISPOSITION

Both parties agree the abstract of judgment requires correction with regard counts 11 through 19 because it incorrectly states the term for those crimes is "consecutive full term" instead of eight-month terms for each. We agree and order the clerk of the court to correct the abstract of judgment as specified herein. The clerk shall forward a copy of the corrected abstract to the California Department of Corrections and Rehabilitation. With that exception, we affirm the judgment in its entirety.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

O'LEARY, J.